A **TERESA TERINE PEREIRA & ANOR v. ADRIAN SASHA PAUL**

HIGH COURT MALAYA, KUALA LUMPUR
WAN AHMAD FARID WAN SALLEH JC
[CIVIL APPEAL NO: WA-22NCVC-241-05-2017]
21 MAY 2018

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CIVIL PROCEDURE: *Subpoena – Setting aside – Application for – Materiality of witness for just disposal of case – Whether proved – Whether outweighed any oppression that might be caused to party objecting – Whether witness listed in list of witness – Whether pleadings revealed facts relating to involvement of proposed witness – Whether subpoena made bona fide – Whether issuance of subpoena ought to be allowed – Rules of Court 2012, O. 38 r. 14(4)*

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While preparing for his defence, the defendant had caused a subpoena to be issued against the plaintiff's counsel ('Mr Dicom'). In the present application, the plaintiff sought to set aside the said subpoena, pursuant to O. 38 r. 14(4) of the Rules of Court 2012 ('ROC'). In support of the application, the plaintiff submitted that (i) the opposition to the subpoena was premised on the basic right of a litigant to be represented by a counsel of his/her choice and this is guaranteed by art. 5(3) of the Federal Constitution ('FC'); (ii) the onus was on the party issuing the subpoena to show the materiality of the witnesses for the just disposal of the case, in that it outweighed any oppression that might be caused to the party objecting; (iii) Mr Dicom's name was not listed on the defendant's list of witnesses; (iv) the parties were bound by their pleadings and the defendant, in his defence, had not pleaded any facts relating to the involvement of Mr Dicom; and (v) there was a 13-day delay in issuing the subpoena. The defendant argued that (i) he would be denied the opportunity to fully, fairly and freely present his defence as Mr Dicom was a material witness for the case and his testimony was necessary for the just disposal of the matter; (ii) there were two instances where the testimony of Mr Dicom was relevant, namely (a) there was evidence that the first plaintiff had transferred RM55,000 from Clement & Co Property Consultants' bank account to Mr Dicom's personal account; and (b) during the plaintiff's case at the trial, one of the plaintiff's own witnesses ('Maheshkumar') testified that Mr Dicom and his assistant had contacted him on numerous occasions and sent an email containing a draft affidavit prepared by them which suggested Maheshkumar had allowed the payment of RM27,000 to be made to the first plaintiff to one Mark Sheen; (iii) the selection and order of witnesses was at the defendant's discretion; and (iv) Mr Dicom knew, or would have known, that he was likely to be a witness following his alleged involvement.

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Held (dismissing application with costs in cause):

(1) The constitutional guarantee reflected in art. 5(3) of the FC refers only to criminal cases that involve the right of an arrested person. In contrast, this was a civil case. The right to the counsel of choice was not absolute in the sense that it was subject to the law that governed the conduct of an advocate and solicitor. (paras 21-22)

(2) The fact that Mr Dicom was not listed in the list of witnesses submitted to the court was not a bar to the issuance of a subpoena against him. This was especially so if new facts emerge in the course of the trial that need to be rebutted or corroborated. Maheshkumar had given evidence that implicated Mr Dicom and his assistant. It might or might not be true. It was for the court to assess at the end of the trial. However, since his name was specifically mentioned in evidence, it lent support to the argument that the issuance of the subpoena went to the materiality of the witness for the just disposal of the case. In fact, it was only by being a witness that Mr Dicom could assist the court to put things into perspective. (para 23)

(3) The materiality of the proposed witness outweighed the oppression that might have been caused to the objecting party. In the course of giving evidence at the continued trial, it was still open for Mr Dicom to invoke s. 126 of the Evidence Act 1950 and the court would then decide, one way or the other, whether it was applicable. It would be determined and when it arises. However, in the meantime, since Mr Dicom was found to be a material witness, he had to abide by the subpoena issued to him. The 13-day delay was not inordinate and not fatal. (paras 25, 26 & 28)

Case(s) referred to:

ECM Libra Investment Bank Bhd v. Foo Ai Meng & Ors [2013] 1 LNS 99 CA ***(refd)***
Paruvathy Palany v. Sathiasealan Govindasamy [1999] 6 CLJ 113 HC ***(refd)***
R v. Secretary of State for India in Council & Ors, ex p Ezekiel [1941] All ER 546 ***(refd)***
Senja Cerah Sdn Bhd v. Sisprop Sdn Bhd; Tan Sri Cheng Heng Jem & Ors (Applicants) [2009] 7 CLJ 256 HC ***(refd)***
Sykt Pengangkutan Sakti Sdn Bhd v. Tan Joo Khing [1997] 3 CLJ 754 HC ***(refd)***
Tan Chong Kean v. Yeoh Tai Chuan & Anor [2018] 3 CLJ 294 FC ***(refd)***
Wee Kok Bin v. Aseambankers Malaysia Bhd [2011] 5 CLJ 466 HC ***(refd)***
Wong Sin Chong & Anor v. Bhagwan Singh & Anor [1993] 4 CLJ 345 SC ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 126
Federal Constitution, art. 5(3)
Legal Profession (Practice and Etiquette) Rules 1978, rr. 3, 28(3)
Rules of Court 2012, O. 38 r. 14(4)

For the appellant - Gregory Dicom & Anita Thaiyub Khan; M/s AG Dicom & Co
For the respondent - Fahri Azzat, Asim Ng & Maizatul Amalina PDK; M/s Fahri & Co

Reported by Najib Tamby

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JUDGMENT

Wan Ahmad Farid Wan Salleh JC:

[1] This application before me is made in the middle of the trial, when plaintiffs are about to close their case.

B **[2]** In the preparation for his defence, the defendant had caused a subpoena to be issued against the plaintiffs' counsel. Before me, the plaintiffs are applying to set aside the subpoena issued by the defendant against Augustine Gregory Dicom ("Encik Dicom"), who is the counsel for the plaintiffs herein. His firm, Messrs AG Dicom & Co ("Messrs AG Dicom") C is the solicitors on record for the plaintiffs. The application, which is made under O. 38 r. 14(4) of the Rules of Court 2012 ("ROC"), is supported by the affidavit of the first plaintiff dated 8 April 2018 ("AIS") who also affirmed the same on behalf of the second plaintiff.

[3] In response thereto, the defendant filed an affidavit in reply dated D 17 April 2018 which is in encl. 187. The first plaintiff then filed a further affidavit dated 26 April 2018, which is in encl. 189.

[4] Order 38 r. 14(4) of the ROC provides as follows:

> The Registrar may, in any case, revoke a subpoena upon an application E by any person or on his own motion.

[5] On 23 March 2018, the Deputy Registrar had caused the issuance of a subpoena to testify and produce documents under O. 38 r. 14 to Encik Dicom to give evidence and produce documents as follows:

F (a) GST-03 statement and payment slip to the Royal Malaysian Customs Department ("JKDM") for the payment of goods and services tax ("GST") by Messrs AG Dicom regarding the invoices and official receipts dated 5 July 2017, 14 July 2017 and 25 September 2017 issued to the first plaintiff for the legal services rendered ("the said three transactions");

G (b) Account statements and/or records of Messrs AG Dicom that reflect on the receipt of payment for the said three transactions;

(c) Any letter or instruction from Messrs AG Dicom in the form of a memo to the first plaintiff or Clement & Co Property Consultants ("CCPC") H informing that the payment for the said three transactions must be made into the personal account of Encik Dicom and not into the firm's bank account;

(d) Any payment slips or personal account statement of Encik Dicom that reflects on the receipt of payment for the said three transactions as stated I in the monthly account statement of CCPC (Public Bank Berhad account number 3198822509);

(e) Any document pertaining to the payment and receipt of the fees for the legal services for this proceeding and for the civil suits at the High Court of Malaya at Kuala Lumpur *vide* Wa-32NCVC-422-03-2017 and WA-22NCVC-351-07-2017; and

(f) Any other related documents in respect of the above.

[6] Pursuant to an order of this court dated 19 June 2017 ("encl. 24 order") I had allowed the plaintiffs' application to appoint the first plaintiff as the administrator *pendente lite* for CCPC until the disposal of this action. The first plaintiff is the widow of Clement Ignatius Fernandez ("the deceased").

The Plaintiffs' Submission

[7] At the outset, learned counsel for the plaintiffs referred me to the then Supreme Court's judgment in *Wong Sin Chong & Anor v. Bhagwan Singh & Anor* [1993] 4 CLJ 345 SC where it was held *inter alia* that the onus is on the party issuing the subpoena to show the materiality of the witness for the just disposal of the case, in that it outweighs any oppression that may be caused to the party objecting.

[8] In any event, Encik Dicom's name was not listed on the defendant's list of witnesses.

[9] Learned counsel then reminded me that parties herein are bound by their pleadings. The then Supreme Court in *Wong Sin Chong* held that learned trial judge ought to have relied more on the particulars of negligence pleaded in the statement of claim to determine materiality rather than on the three matters which he himself had thought to be relevant matters.

[10] Premised on the aforesaid proposition, learned counsel then submitted that the defendant in his defence dated 13 June 2017 has not pleaded any facts relating to the involvement or otherwise made any reference to the role of Encik Dicom. It is, therefore, the argument of learned counsel that the issuance of the subpoena on Encik Dicom has nothing to do with the pleaded case of the defendant.

[11] Learned counsel then attracted my attention to the issue of oppression within the context of the proposition in *Wong Sin Chong*. Counsel argued that although the subpoena was issued on 23 March 2018, it was only served on Encik Dicom on 5 April 2018, which is a good 13-day delay. In the circumstances, counsel further argued that it is clearly "an oppressive subpoena with multifarious motives of *inter alia* depriving the plaintiffs of the services of the plaintiff's counsel in the middle of the trial".

[12] Further, the plaintiffs seek refuge from s. 126 of the Evidence Act 1950 ("EA") which provides as follows:

> (1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:
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> Provided that nothing in this section shall protect from disclosure:
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> (a) any such communication made in furtherance of any illegal purpose;
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> (b) any fact observed by any advocate in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.

Learned counsel for the plaintiffs then submitted that the issue of whether the GST payments were paid by the plaintiffs' solicitors to the JKDM on the payment of professional fees by CCPC for Suit 351 and the examination of the accounts of Messrs AG Dicom are not even pleaded facts. In any event, they are invariably caught by the privileged communication between solicitor and client.

[13] My attention was then brought to the Federal Court case of *Tan Chong Kean v. Yeoh Tai Chuan & Anor* [2018] 3 CLJ 294 FC which declared that s. 126 of the EA is not a mere rule of evidence but a principle of fundamental justice.

[14] The opposition to the subpoena was also premised on the basic right of a litigant to be represented by a counsel of his or her choice. Learned counsel then submitted this is guaranteed by art. 5(3) of the Federal Constitution. It provides as follows:

> Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

The Defendant's Submission

[15] Learned counsel for the defendant submitted that the defendant would be denied the opportunity to fully, fairly and freely present his defence as Encik Dicom is a material witness for the instant case and his testimony is necessary for the just disposal of the matter.

[16] Learned counsel conceded on the point of law that the party issuing the subpoena has to show the "materiality of the witness" and this according to counsel, outweighs any oppression that may be caused to the party objecting. He cited the case of *Senja Cerah Sdn Bhd v. Sisprop Sdn Bhd; Tan Sri Cheng Heng Jem & Ors (Applicants)* [2009] 7 CLJ 256.

[17] There are at least two instances where counsel contended that the testimony of Encik Dicom is relevant and material to the fair determination of the instant case. The first is that there was evidence that the first plaintiff had transferred a sum of RM55,000 from CCPC's bank account to Encik Dicom's personal account. This part has been admitted by the first plaintiff. In para 14 of the AIS the first plaintiff *inter alia* affirmed as follows:

> Lebih dari itu, saya mengakui transaksi tersebut dibuat terhadap akaun peribadi Augustine Gregory Dicom. Peguamcara saya telah mengeluarkan inbois dan resit kepada saya untuk jumlah tersebut. Kesemua dokumen ini yang telah dikemukakan kepada Mahkamah melalui Ikatan 12 Ikatan Dokumen Plaintif-Plaintif.

Counsel argued that the conceded fact that the receipts were issued to the first plaintiff instead of to CCPC had raised, not to put too fine a point on it, more questions than answers.

[18] Secondly, during the plaintiffs' case at the trial, one of the plaintiffs' own witnesses, Maheshkumar a/l JK Sanghrajka ("Maheshkumar") has testified that Encik Dicom and his assistant Cik Anita Thaiyub Khan had contacted him on numerous occasions and sent an email containing a draft affidavit prepared by them which suggests Encik Maheshkumar had allowed the payment of RM27,000 to be made to by the first plaintiff to one Mark Sheen. In his testimony, Maheshkumar, who is PW8, denied having ever permitted the payment.

[19] On the argument that Encik Dicom was not in the defendant's witnesses' list, learned counsel for the defendant brought my attention to the case of *Wee Kok Bin v. Aseambankers Malaysia Bhd* [2011] 5 CLJ 466 which is the proposition that the selection and order of witnesses is at the defendant's discretion. Counsel argued that the defendant has every right and prerogative to call anyone as his witness, either to strengthen his defence or destroy the plaintiffs' case.

[20] In any event, counsel continued, Encik Dicom knew or would have known that he was likely to be a witness following his alleged involvement. Learned counsel for the defendant submitted that by accepting the brief, Encik Dicom is likely to put himself in an awkward and embarrassing situation under r. 3 of the Legal Profession (Practice and Etiquette) Rules 1978 ("LPPER"). I was then referred to the case of *Paruvathy Palany v.*

Sathiasealan Govindasamy [1999] 6 CLJ 113; [1999] 5 MLJ 151. In the aforesaid case, the learned judge referred to r. 28(a) of the LPPER and held that if while appearing in a case it becomes apparent that he will be such a witness, he shall not continue to appear if he can retire without jeopardising his client's interest.

The Finding

[21] At the beginning, let me dispose of the issue whether the right to a counsel of choice is absolute. It should be borne in mind that the constitutional guarantee as reflected in art. 5(3) of the Federal Constitution refers only to criminal cases that involve the right of an arrested person. In contrast, this is a civil case. In *Syarikat Pengangkutan Sakti Sdn Bhd v. Tan Joo Khing (t/a Bengkel Sen Tak)* [1997] 3 CLJ 754; [1997] 5 MLJ 705 it was held that the right of a particular individual to be represented by an advocate and solicitor of his own choice is not absolute. It is the court that will determine that right; see *R v. Secretary of State for India in Council & Ors, ex p Ezekiel* [1941] 2 All ER 546.

[22] The right to the counsel of choice is not absolute in the sense that it is subject to the law that governs the conduct of an advocate and solicitor which includes the Legal Profession Act 1976 and LPPER.

[23] Secondly, learned counsel for the plaintiffs took objection to the fact that Encik Dicom was not listed in the list of witnesses submitted to the court. With respect, I do not think that this is a bar to the issuance of a subpoena against Encik Dicom. This is especially so if new facts emerge in the course of the trial that need to be rebutted or corroborated. Maheshkumar has given evidence that implicated Encik Dicom and his assistant. It might be true, it might not. That is for this court to assess at the end of the trial. But in my opinion, since his name was specifically mentioned in evidence, it lends support to the argument that issuance of the subpoena goes the materiality of the witness for the just disposal of the case and I so hold. In fact, it is only by being a witness that Encik Dicom can assist the court to put things into perspective.

[24] On the applicability of s. 126 of the EA, it is too early for me to determine at this stage whether the documents sought for Encik Dicom to produce at the trial would be caught by the solicitor-client privilege. I could only refer to the judgment of Hishamudin Mohd Yunus J (later JCA) in *Senja Cerah* that in dealing with the issues pertaining to the application to set aside the subpoena, I shall avoid touching on the merits of the claim or defence of either side in respect of the main action. These are matters to be determined at the end of the trial.

[25] In other words, in the course of giving evidence at the continued trial, it is still open for Encik Dicom to invoke s. 126 and I will then decide one way or the other whether it is applicable. It will be determined as and when it arises. But in the meantime, since, it is my finding that Encik Dicom is a material witness, he has to abide by the subpoena issued to him.

[26] In *Senja Cerah* the learned judge held as follows:

> I do not think that it is the law that I must at this stage of the proceeding deny the defendant the issuance of the subpoenas just because of the applicants' denials; nor do I in the present inquiry need to be convinced of the truth of the averments in the defendant's affidavits on a balance of probabilities, in deciding whether or not I ought to set aside the subpoenas. As long as I am satisfied – and it is the case here - that the applications for the subpoenas are made *bona fide*, that there is some credibility in the defendant's affidavit evidence in relation to the materiality of the proposed witnesses, and that triable issues have been raised by the defendant by their affidavits, I ought not as a matter of law set aside the subpoenas that had already been issued and served.

I agree with this observation and I believe it is the correct proposition of the law and is my finding that the materiality of the proposed witness outweighs the oppression that may have caused to the objecting party.

[27] In *ECM Libra Investment Bank Bhd v. Foo Ai Meng & Ors* [2013] 1 LNS 99; [2013] 3 MLJ 35 CA the Court of Appeal held that the test to compel is a strict test. The witnesses who can be compelled are those 'who have seen the facts or who know the facts'. Having read the affidavits of the parties herein and having heard the evidence thus far, I have come to an inescapable conclusion that Encik Dicom is who has seen the facts or who know the facts that lead to the fair disposal of the matter.

[28] The only issue left for me to determine is the question of the delay between the issuance of the subpoena and the service of the same. While I can understand the delay is undesirable and could have been avoided, I cannot, with respect, assent to the argument that it, therefore, means that is an oppressive subpoena with multifarious motives. The delay of 13 days, in my opinion, is not inordinate and is not fatal, and I so hold.

[29] However, for the avoidance of any doubt, my finding herein does not in any way cast any aspersion on Encik Dicom or his assistant or that any provision of the LPA or LPPER has been breached.

[30] For the reasons aforesaid, the application in encl. 177 is dismissed with costs in the cause.